91-537

No. 91-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

ROBERT GARCIA AND JANE LEE GARCIA,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BARRY A. BOHRER
Counsel of Record

JOEL M. COHEN
MORVILLO, ABRAMOWITZ, GRAND,
IASON & SILBERBERG, P.C.
530 Fifth Avenue
New York, New York 10036
(212) 221-1414
Attorneys for Petitioner Robert Garcia

RONALD P. FISCHETTI
FISCHETTI & RUSSO
757 Third Avenue
New York, New York 10017
(212) 593-7100
Attorneys for Petitioner Jane Lee Garcia

QUESTION PRESENTED

Whether the Double Jeopardy Clause of the Fifth Amendment bars retrial where an ambiguous verdict stemmed from the government's erroneous insistence that a case be submitted to the jury upon multiple theories in the same count, even though there was no evidence to support one of the two theories.

PARTIES TO THE PROCEEDING

The parties in the proceedings in the Court of Appeals for the Second Circuit were the United States of America, Robert Garcia and Jane Lee Garcia.

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1991

No. 91-

ROBERT GARCIA and JANE LEE GARCIA,

Petitioners,

V.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

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Petitioners Robert Garcia and Jane Lee Garcia (the "Garcias") respectfully request that a writ of certiorari be issued to review a decision of the United States Court of

Appeals for the Second Circuit, entered on June 28, 1991, which affirmed the decision of the United States District Court for the Southern District of New York denying petitioners' motion to bar retrial and to dismiss the remaining counts of an indictment on double jeopardy grounds.

OPINIONS BELOW

The opinion (per Timbers, J., Meskill, J. and Pratt, J.) of the Court of Appeals for the Second Circuit is reported as *United States v. Garcia*, 938 F.2d 12 (2d Cir. 1991) and is reprinted in the Appendix to this petition, *infra*, at A-1 - A-11. The decision of the United States District Court for the Southern District of New York (Sand, D.J.) has not been reported. It is reprinted in the Appendix, *infra*, at B-1 - B-12. A related decision of the Court of Appeals is reported as *United States v. Garcia*, 907 F.2d 380 (2d Cir. 1990), and is reprinted in the Appendix, *infra*, at C-1 - C-14.

JURISDICTION

The decision of the United States Court of Appeals for the Second Circuit, of which review is sought, was entered on June 28, 1991. That decision affirmed on interlocutory appeal the decision of the United States District Court for the Southern District of New York denying petitioners' motion to bar retrial and to dismiss the remaining counts of an indictment on double jeopardy grounds. No petition for rehearing was sought.

The jurisdiction of this Court to review the judgment of the Second Circuit is invoked under *28 U.S.C. §1254(1)*.

CONSTITUTIONAL PROVISION AND FEDERAL RULE

U.S. CONST. Amend. V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Federal Rule of Criminal Procedure 31(d):

Poll of Jury: When a verdict is returned and before it is recorded the jury shall be polled at the request of any party or upon the court's own motion. If upon the poll there is not unanimous concurrence, the jury may be directed to retire for further deliberations or may be discharged.

STATEMENT OF THE CASE

This case raises a significant and recurring issue relating to whether double jeopardy principles bar a retrial of defendants where there is uncertainty as to the initial jury verdict and there is a logical basis for concluding that the defendants had obtained a favorable resolution of the charges against them on that verdict. This question was expressly left open in *Abney v. United States*, 431 U.S. 651, 663-64 & n.9 (1977), and has divided those federal circuits and district courts that have considered it.

More particularly, this case presents the Court with the opportunity to determine whether double jeopardy principles are implicated when the responsibility for a previously rendered ambiguous verdict is attributable in large measure to the government. In *United States ex rel. Jackson v. Follette*, 462 F.2d 1041, 1049 (2d Cir.), *cert. denied*, 409 U.S. 1045 (1972), the Court of Appeals set forth a test designed to balance on a "fine scale" the relative responsibilities of the government and the defense for the ambiguity of a jury's verdict. By affirming the denial of petitioners' motion to bar retrial and to dismiss the remaining counts of the instant indictment, the Court of Appeals departed from its *Jackson* test and the tenor of this Court's recent decisions expanding the breadth of double jeopardy jurisprudence. If permitted to stand, the decision below would leave defendants little protection from the double jeopardy prohibition following ambiguous verdicts that frequently can result from prosecutorial overreaching in

charging and advocating multiple theories in the same count.

A. The Trial and First Appeal

Indictment 88 Cr. 852 was filed on November 21, 1988 (JA 20-36)[1] in seven counts against the Garcias and Ralph Vallone, Jr.[2] Count One charged the Garcias and Vallone with conspiring to commit extortion and receive bribes and unlawful gratuities, in violation of Title 18, United States Code, Section 371. Count Two charged the Garcias with obtaining through extortion $76,000 in payoffs from the Wedtech Corporation, in violation of Title 18, United States Code, Sections 1951 and 2. Count Three charged the Garcias alone with obtaining through extortion a $20,000 interest-free loan from Wedtech, also in violation of Title 18, United States Code, Sections 1951 and 2. Counts Four and Six charged the Garcias with receiving and aiding and abetting the receipt of bribes and unlawful gratuities in connection with the same $76,000 charged in Count Two, in violation of Title 18, United States Code, Sections 201(c) and (g) and 2. Counts Five through Seven charged the Garcias with receiving and aiding and abetting the receipt of a bribe and unlawful gratuity in

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[1] As used herein "JA" refers to pages from the joint appendix, which was filed with the brief submitted to the Court of Appeals; "Tr." refers to pages from the trial transcript.

[2] The charges against Vallone were severed for medical reasons.

connection with the same $20,000 loan charged in Count Three, also in violation of Title 18, United States Code, Sections 201(c) and (g) and 2.

Counts One through Three alleged two theories of extortion: extortion under color of official right and extortion by wrongful use of fear of economic loss. The two theories were alleged in tandem in each of the conspiratorial objectives specified in Count One and in the substantive extortion allegations set forth in Counts Two and Three. At the close of the government's case, the Garcias moved unsuccessfully for a judgment of acquittal on the fear of economic loss theory, arguing that the evidence in support of that theory was legally insufficient to submit it to the jury. (Tr. 2221-26, 2333-38).

At trial the District Judge instructed the jurors that they had to be unanimous as to both the objective of the conspiracy and the theory of extortion they had found proven. (Tr. 2668, 2681). The government did not request a special verdict or special interrogatories specifying the theory of extortion that the jurors found to have been proven.

On October 20, 1989, the jury returned a general verdict of guilty against both defendants on the conspiracy and extortion counts (Counts One, Two, and Three) without specifying under which theory of extortion it had convicted the defendants. The jury

acquitted the Garcias on the bribery and gratuity charges (Counts Four through Seven).[3]

On appeal, the Court of Appeals reversed the convictions, finding that the evidence of extortion by fear of economic loss was legally insufficient. Because there were no special jury interrogatories, the Court of Appeals could not determine whether the jury's verdict rested on the fear of economic loss theory or the color of official right theory, on which the government now seeks to retry the Garcias. Accordingly, the Court of Appeals remanded the matter to the District Court "for further proceedings." *United States v. Garcia*, 907 F.2d 380, 385 (2d Cir. 1990).

B. Proceedings on Remand

Following the reversal of the Garcias' convictions, the defendants moved for an order barring retrial and dismissing the remaining counts of the indictment. The defendants argued that retrial was barred because the ambiguous verdict stemmed from the government's erroneous submission to the jury of multiple legal theories contained in the same count of the indictment, where there was no evidence to support one of the two

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[3]The District Judge sentenced both Robert and Jane Garcia to terms of imprisonment of three years on Counts One, Two, and Three to be served concurrently, with the proviso that pursuant to *18 U.S.C. § 4205(b)*, they each become eligible for parole in six (6) months. The court also imposed the mandatory special assessment of $150.

theories, and because the jury may have acquitted on the theory upon which the government seeks a retrial.

In an opinion dated December 3, 1990, the District Court denied the motion. The District Court noted the purported relevance of this Court's decision in *Burks v. United States*, 437 U.S. 1 (1978), and analyzed defendants' claims pursuant to the balancing test established by the Court of Appeals in *United States ex rel. Jackson v. Follette*, 462 F.2d 1041 (2d Cir.), *cert. denied*, 409 U.S. 1045 (1972), which the District Court described as the "leading Second Circuit case applying the *Burks* implied acquittal holding for Fifth Amendment Double Jeopardy Clause purposes."[4] (B5).

Borrowing from the factors set forth in *Jackson*, the District Court stressed that special interrogatories could have been requested to resolve any ambiguity in the verdict. The District Judge found that a definitive answer would have been rendered if special interrogatories had been taken, posing the issue as "not one of fault but one of opportunity missed." (B7).

Rejecting defendants' claim that the responsibility for the ambiguous verdict was attributable to the government, the District Court found that the prosecutors' pursuit of the invalid theory of extortion did not

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[4] *Burks v. United States, 437 U.S. 1, 17-8 (1978)*, decided six years after *Jackson*, held that a reversal on the ground of insufficient evidence barred a retrial in the same manner as a judgment of acquittal.

"constitute deliberate governmental wrongdoing"; that the government's failure to seek special interrogatories was excusable because the "use of special interrogatories in criminal cases is relatively rare"; and that the defendants failed to avail themselves of the opportunity to request that special interrogatories be submitted to the jury after it had returned its general verdict. (B9-10). In short, the District Court found that "this case is not one in which government action is the sole cause of the present posture of this case." (B10).

C. The Second Appeal

On appeal, the Court of Appeals affirmed the decision of the District Court.[5] Unlike the District Court, the Court of Appeals declined to apply the analysis it previously set forth in *United States ex rel. Jackson v. Follette*, 462 F.2d 1041 (2d Cir.), *cert. denied*, 409 U.S. 1045 (1972), holding that there was "no basis" for concluding that the jury's verdict was an implicit acquittal, which it found was a prerequisite to the *Jackson* analysis. *Garcia, 938 F.2d at 16.* (A9). In dicta, the Court of Appeals stated that even if it had applied the *Jackson* test, the balance did not weigh in favor of the defendants because they did not ask for special interrogatories to clarify any ambiguities in the verdict. *Id.* (A9-10).

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[5]On December 12, 1990, the district court entered an Order staying retrial pending disposition of the defendants' appeal to the Court of Appeals.

In reaching its conclusion, the Court of Appeals also rejected analogous authority from the United States Court of Appeals for the Fourth Circuit. *Garcia*, 938 F.2d at 15; *see United States v. Stanley*, 597 F.2d 866 (4th Cir. 1979) (barring retrial). (A8-9).[6]

REASON FOR GRANTING THE WRIT

The Double Jeopardy Clause of the Fifth Amendment bars retrial where an ambiguous verdict stems from the government's erroneous insistence that a case be submitted to the jury upon multiple theories in the same count, even though there was no evidence to support one of the two theories.

This case presents the Court with questions critical to the continued viability of the protections of the double jeopardy clause of the Fifth Amendment to the Constitution. In *Abney v. United States*, 431 U.S. 651, 663-64 & n.9 (1977), this Court expressly left open the question of under what circumstances an ambiguous jury verdict renders subsequent prosecution on some or all of the same charges barred by double jeopardy. This case presents a novel twist to the question left unanswered by this Court in *Abney*: whether a verdict stemming from the government's erroneous insistence that a case be

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[6]The mandate issued forthwith; no further stay was sought. Retrial of the Garcias on the remaining counts commenced on September 11, 1991, and is pending as of the date of this petition.

submitted to the jury upon multiple legal theories in the same count, when there was no evidence to support one of its two theories, bars retrial where it is possible that the jury acquitted on the theory upon which the government seeks a retrial.

The double jeopardy issues raised by this petition frequently are implicated because of the government's practice of pursuing multiple theories of criminality in a single duplicitous count of an indictment. This case presents the Court with the opportunity not only to clarify the application of double jeopardy principles to "ambiguous verdicts," including implicit acquittals, but to articulate the government's responsibility to prevent such verdict ambiguity in the first instance.

The decision of the Court of Appeals below creates a split of authority between the Circuits. *See United States v. Stanley*, 597 F.2d 866 (4th Cir. 1979). Moreover, other courts that have considered analogous double jeopardy issues have applied a balancing test similar to the one set forth in *Jackson*, which the Court of Appeals below erroneously rejected as inapplicable to this case. *See Saylor v. Cornelius*, 845 F.2d 1401 (6th Cir. 1988); *United States v. Gray*, 705 F. Supp. 1224 (E.D. Ky. 1988); *United States v. Slay*, 717 F. Supp. 689 (E.D. Mo. 1989).

A. The Legal Principles

This Court has held that the primary purpose of the Double Jeopardy Clause is to prevent successive trials. *Sanabria v. United States*, 437 U.S. 54, 63 (1978).

That a verdict of acquittal, in whatever form, bars any retrial is "the most fundamental rule in the history of double jeopardy jurisprudence." *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977) (quoting *United States v. Ball*, 163 U.S. 662, 671 (1896)).

In applying this principle, courts have recognized that it does not matter whether the final judgment constitutes a formal "acquittal," which results from jury or bench verdicts of not guilty as well as from findings of insufficient evidence at the trial or appellate level. What constitutes an "acquittal" is not to be "controlled by the form" of the fact finder's decision. *Martin Linen Supply Co., supra*, 430 U.S. at 571. The critical determination is whether that decision "actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged." *Id.*

Thus, in cases where the finder of fact is presented with two theories of criminal liability and returns a verdict as to one but is silent as to the other, this Court has interpreted that jury silence as an "implicit acquittal." *E.g., Green v. United States*, 355 U.S. 184, 190 (1957). So, too, in *United States v. Stanley*, 597 F.2d 866 (4th Cir. 1979), the Court of Appeals inferred that the defendant may have been acquitted on one of two charges in a count on which an ambiguous guilty verdict was rendered, holding that double jeopardy barred retrial on either charge.

In *Stanley*, the defendant was charged in Count I with possession of a Mannlicher pistol and in Count II with the possession both of a Derringer pistol and a

Gewehrlaufstal shotgun. The possession of these weapons by Stanley was illegal because he was a convicted felon. The government had seized the weapons by executing three separate search warrants. In a non-jury trial, the District Court rendered a verdict finding the defendant guilty on Count II in that "*he had in his possession a firearm.*" *Id.* at 871. (emphasis in original).

On appeal, the Court of Appeals sustained the seizure of both pistols but found that the shotgun was unlawfully seized and that the District Court erred in denying Stanley's motion to suppress that weapon. Thus, it determined that the conviction on Count II should be reversed. In reversing Stanley's conviction for possession of the shotgun, the Court of Appeals inferred from the language of the verdict that "Stanley was found guilty of possessing one of the weapons and not guilty of possessing the other." *Id.* at 872 n.7. Finding that "he may have been acquitted of possessing either the Derringer or the [shotgun]," the Court held that double jeopardy barred Stanley's retrial on either offense.[7] *Id.*

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[7]Because *Stanley* involved a non-jury trial, the ambiguity caused by its result arguably could have been clarified by remand to the district court with instructions that the trial court state upon which one of the two gun charges Stanley had been acquitted. Here, the ambiguity of the verdict against the Garcias is far more intractable, because the jury's opinion as to the precise nature of the verdict cannot be determined.

Courts faced with double jeopardy claims in cases where it has been impossible to determine whether the jury actually acquitted, or where it has been implausible to find an "implied acquittal" on a particular charge, have resorted to weighing the competing interests of the parties to determine whether retrial should be barred.

Thus, in *United States ex rel. Jackson v. Follette*, 462 F.2d 1041 (2d Cir.), *cert. denied*, 409 U.S. 1045 (1972), the Court of Appeals considered petitioner's application for a writ of habeas corpus, claiming that principles of double jeopardy barred retrial after his conviction for murder of a police officer. At Jackson's trial the jury was presented with evidence, and the court instructed it, on both "common law" or premeditated murder, and felony murder, each of which was murder in the first degree under New York law. Without objection from Jackson, the jury was also instructed that if it returned a verdict on one charge it was to remain silent on the other. Jackson was convicted of premeditated murder; no verdict was rendered as to felony murder. *Id.* at 1043. This Court reversed the conviction for premeditated murder, holding unconstitutional the New York procedure permitting the jury to pass upon the voluntariness of a confession. *Jackson v. Denno*, 378 U.S. 368 (1964).

At Jackson's second trial, the prosecution again introduced evidence pertaining to felony as well as premeditated murder. The charge to the jury was essentially the same as given at the first trial. But the second jury found Jackson guilty of felony murder and remained silent on premeditated murder.

On appeal, Jackson argued that because the original trial judge left the order of consideration of the respective theories entirely to the jury, it was at least "possible that the jury considered felony murder first and acquitted him of that theory but under the single verdict charge the jury was not able to express an acquittal." 462 F.2d at 1044. He further argued that "even if his conviction for premeditated murder were not an 'implicit acquittal' of the charge of felony murder, his first jury was dismissed without his consent after having been given a 'full opportunity to return a verdict' on that charge without any circumstances appearing that prevented it from doing so." 462 F.2d at 1045. Finding the case "sui generis," the Court of Appeals resorted to a balancing test to "weigh on a fine scale the competing interests of the public and petitioner." *Id.* at 1049.

Other courts that have considered analogous double jeopardy issues have applied a similar balancing test. In *Saylor v. Cornelius*, 845 F.2d 1401 (6th Cir. 1988), the Court of Appeals barred retrial on double jeopardy grounds after performing a *Jackson*-type balancing test by weighing the relative responsibility of the parties for the failure to submit all theories of culpability to the jury. The court found that the ambiguous verdict was largely attributable to the prosecution, because it failed to object to the judge's charge even though it was on notice that the defense had objected to the charge. *Id.* at 1407.[8]

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[8]The Court of Appeals stated:

(continued...)

Relying upon *Saylor*, the District Court in *United States v. Gray*, 705 F. Supp. 1224 (E.D. Ky. 1988), upon remand from this Court's decision in *McNally v. United States*, 483 U.S. 350 (1987) (barring mail fraud prosecution on "intangible rights" theory), held that double jeopardy principles barred retrial of the defendants on the remaining property rights theory. Significantly, the court observed that "[t]he government could have pursued these theories in separate counts in drafting the indictment or requested that special interrogatories be submitted to the jury on each theory" but failed to do so, instead including all theories in each count. *Id.* at 1231-32. *See also United States v. Slay*, 717 F. Supp. 689, 695 (E.D. Mo. 1989) (barring mail fraud prosecution on double jeopardy grounds: "[a]s in *Gray*, the indictment commingled the good government theory with the property theory and did not delineate the property theory in a separate count").

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[8](...continued)

> The defense did not "lie in the weeds" and simply wait for an appellate reversal on this point. While it is true that the defense did not stand up and demand that the judge charge the jury on the additional theory of accomplice liability, the defense lawyer hardly can be faulted for not having done the prosecutor's job.

845 F.2d at 1407.

B. Retrial is Barred

Judged by these standards and in light of this authority, retrial of the Garcias on the remaining theory of extortion is barred by the double jeopardy prohibition. In ruling to the contrary, the Court of Appeals declined to apply the test it set forth in *Jackson*. With little analysis, the Court dismissed as "unacceptable speculation" the argument that the jury may have acquitted petitioners on the color of official right theory, holding that there was not even "some basis" for determining that there was an implicit acquittal. *Garcia, 938 F.2d at 15.* (A7-8).

That the jury may have acquitted the Garcias on the color of official right theory of extortion is based on more than mere speculation. It is based upon the similarities between the elements of the offenses of receipt of bribes and gratuities to influence official acts -- of which petitioners were acquitted -- and extortion under color of official right. Extortion under color of official right has long been viewed as the analog of the receipt of bribes and gratuities by public officials, as both involve misuse of a public official's office. *See United States v. Harding*, 563 F.2d 299, 304-05 (6th Cir. 1977) (extortion covers wide range of activity, including what is commonly understood as bribery; extortion and bribery are not mutually exclusive), *cert. denied*, 434 U.S. 1062 (1978).

This is particularly the case here, where the extortion, bribery and gratuity allegations all were based upon the same two transactions. Indeed, those counts of

the indictment that alleged official receipt of bribes and gratuities incorporated by reference essentially the same means and methods and overt acts alleged in the conspiracy count, which alleged as one of its objects extortion under color of official right.

The jury acquitted the Garcias of all bribery and gratuity charges. It is hardly "speculation" to conclude that the jury's rejection of those charges, which required little proof beyond that of the Congressman's accepting the money in his official capacity, also caused it to reject the theory of extortion premised on the exact same conduct.[9]

Policy considerations, apparently ignored by the Court of Appeals, likewise support recognizing the jury's silence as an implicit acquittal of extortion under color of official right. In the words of "perhaps the leading law review article on the subject,"[10] it seems "more

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[9]The Court of Appeals attempted to draw a distinction between the elements of the crime of extortion and those of bribery, noting that bribery requires additional proof that money was offered with the intent of influencing the recipient. There can be no question, however, that the line between the acceptance of benefits and the inducement required for extortion is blurred and elusive, *see United States v. Campo, 774 F.2d 566, 569 (2d Cir. 1985)*, and that this line is even finer between the acceptance of a gratuity and the color of official right charges.

[10]The characterization is that of Chief Judge Oakes of the (continued...)

sound" to treat that silence as "equivalent to acquittal, giving the defendant whatever protection such a verdict would afford." *Mayers & Yarbrough, Bis Vexari: New Trials and Successive Prosecutions, 74 Harv. L. Rev. 1, 17 (1960).* To infer an acquittal on the extortion under color of official right theory is to provide the "logical basis" for resolution of this case that was absent in *Jackson. See Jackson, 462 F.2d at 1049.* Since the Garcias may have been acquitted on that theory, the double jeopardy prohibition bars retrial of charges based exclusively on that theory. *See United States v. Stanley, supra*, 597 F.2d at 872 n.7.

Barring retrial of the remaining counts results not only from logic and policy considerations but from balancing the equities pursuant to the test set forth in *Jackson*, and the analogous standards applied in *Saylor*, *Gray*, and *Slay*. For in this case petitioner's counsel moved to withdraw the deficient theory from the jury's consideration; the defense did not "lie in the weeds" and simply wait for a reversal. The defense did all it was required to do under the law; it can hardly be faulted for not having done the prosecutor's job.

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[10](...continued)
Second Circuit Court of Appeals in *United States ex rel. Jackson v. Follette, 462 F.2d 1041, 1046 n.8 (2d Cir. 1972), cert. denied,* 409 U.S. 1045 (1972).

C. The Government was Responsible for the Ambiguous Verdict

1. The Failure in Drafting and Proof

The history of this case plainly demonstrates that the government is responsible for its present factual posture. It is the government that drafted the indictment, including duplicitous counts, each charging multiple theories.[11] The government premised its charge of extortion by fear of economic loss upon wholly insufficient evidence, demonstrated both by the grand jury testimony, which is bereft of any factual support for such a theory, and by the government's evidence at trial. Thus, there was no evidence to support the fear of economic loss charge contained in the indictment. Had the government obtained a proper indictment, this issue would not now be before this Court.

Despite the lack of evidence to support its fear of economic harm theory, the government aggressively asserted that this theory be submitted to the jury over

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[11]The Court of Appeals erroneously rejected the defendant's characterization of Counts Two and Three of the indictment as duplicitous, concluding without explanation that the argument "does not warrant discussion." *Garcia, 938 F.2d at 15.* (A8-9). In *Abney v. United States, 431 U.S. 651, 663-64 (1977)*, however, this Court held that, as in the indictment here, counts that alleged two alternative legal theories were duplicitous.

vigorous objection by the defense.[12] The government's demand that the factually insufficient theory be submitted to the jury was a form of overreaching, the burden for which it should bear.

2. The Failure to Force Clarification of the Verdict

The government failed to exercise the option of protecting its overly aggressive view of the case by requesting either special verdicts or special interrogatories.[13] Had special verdicts or special interrogatories been requested by the government and rendered, the uncertainty that is the predicate for this petition would not exist. *See United States v. Orozco-Prada*, 732 F.2d 1076, 1084 (2d Cir.) (upholding the use

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[12]In reviewing the trial record on appeal of the convictions, the Court of Appeals found that "there was an 'absence of *any evidence* of detrimental action for nonpayment,'" that "Garcia never even hinted that he was prepared to use his power to harm Wedtech," and that "the Garcias did not create in Moreno or Wedtech *any feeling of fear . . . .*" *United States v. Garcia, 907 F.2d 380, 385 (2d Cir. 1990)* (emphasis added) (C13).

[13]Although the term "special verdict" is sometimes used as the equivalent of a jury interrogatory, "special verdicts" are used to elicit precise findings by the jury in the absence of a general verdict, whereas "special interrogatories" are used in conjunction with a general verdict. *United States v. Ruggiero, 726 F.2d 913, 926 n.1 (2d. Cir.)* (Newman, J., concurring in part and dissenting in part), *cert. denied, 469 U.S. 831 (1984).*

of special verdicts), *cert. denied*, 469 U.S. 845 (1984); *see also United States v. Ruggiero*, 726 F.2d 913, 925-28 (2d Cir.) (Newman, J., concurring in part and dissenting in part) (suggesting that special interrogatories are preferable where the risk of prejudice to the defendant is slight and the advantage of securing particularized finding is substantial), *cert. denied*, 469 U.S. 831 (1984).

In concluding that the government was under no duty to seek special interrogatories, the Court of Appeals failed to consider that the government proceeded on multiple theories in a single count. In similar situations where multiple theories have been alleged in a single count, courts have not hesitated to place the onus for requesting special verdicts or special interrogatories on the government. *See United States v. Adcock*, 447 F.2d 1337, 1338-39 (2d Cir.) (rejecting the prosecution's effort to salvage an invalid conviction by faulting the defendant for failing to request a special verdict), *cert. denied*, 404 U.S. 939 (1971); *Brown v. United States*, 299 F.2d 438, 440 n.3 (D.C. Cir.) (Burger, J.) (government given the option of proceeding to a new trial on either a new indictment or "the present indictment aided by special verdicts," the choice of which "is a determination properly left to the discretion of the United States Attorney"), *cert. denied*, 370 U.S. 946 (1962). *See also United States v. Ruggiero*, 726 F.2d at 926 (Newman, J., concurring in part and dissenting in part) (adopting the holding in *Adcock*).[14]

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[14]Nor is it unreasonable to suggest that the district court (continued...)

This authority comports with sound policy considerations. Commentators have observed that where, as here, the government seeks to prevent defendants from using the jury's silence as an acquittal, "it does not seem unfair to demand that the government assume the responsibility of forcing clarification of the verdict." *Mayers and Yarbrough, Bis Vexari: New Trials and Successive Prosecutions, 74 Harv. L. Rev. 1, 17 (1960).* Indeed, as the government itself conceded at oral argument on appeal of the conviction in this case, "it should have sought interrogatories rather than rely on

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[14](...continued)
bears a similar responsibility. The form of the verdict -- *e.g.*, submission of special interrogatories -- is not mere instructional error. To the extent they are addressed in the Rules, special verdicts and the related special interrogatories are governed by Fed. R. Crim. P. 31. Under Rule 31(d) a district court may take corrective action where, as here, the jury's verdict is uncertain. *See United States v. Rastelli, 870 F.2d 822, 835 (2d Cir.), cert. denied, 110 S. Ct. 515 (1989).* Thus, in this case the District Court had the authority and the responsibility to clarify the ambiguous verdict. As the Court of Appeals has stated, "[i]n *any* case upon the appearance of *any* uncertainty or contingency in a jury's verdict, it is the duty of the trial judge to resolve that doubt." *Id.* at 835, (quoting *United States v. Morris, 612 F.2d 483, 489 (10th Cir. 1979)*) (emphasis in original).

its own and the District Court's estimation of the proof's sufficiency."[15]

D. The Defendants did all that was Required under the Law

Contrary to the suggestion of the Court of Appeals, an analysis of the actions taken by the defense in this case demonstrates that those actions more than met the standards of advocacy required by law.

The Court of Appeals itself has defined the obligations of defendants when faced with a problem involving insufficient evidence and multiple theories of liability. It has "held in a series of cases that where an impermissible basis of conviction arises from an insufficiency of evidence and a valid basis remains on an alternative theory, a defendant must request the trial judge not to submit the invalid basis to the jury . . . ." *United States v. Washington*, 861 F.2d 350, 352 (2d Cir. 1988) (citing cases).

There can be no doubt that petitioners complied with the procedures mandated by the Court of Appeals, which itself noted that the Garcias were "under no obligation to request special interrogatories." *Garcia*, 938 F.2d at 16. (A-10). On several occasions, petitioners argued the insufficiency of the evidence and urged the

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[15]Government's Memorandum of Law in Opposition to Defendant's Motion to Bar Retrial and Dismiss the Indictment at 3 n.**, dated November 1, 1990, filed in the District Court.

court not to submit the fear of economic loss theory to the jury. Defense counsel certainly did not "lie in the weeds," simply awaiting appellate reversal on the point. *See Saylor v. Cornelius*, 845 F.2d at 1407.

In view of these actions, particularly when contrasted with the conduct of the government in the face of its responsibility to force clarification of the verdict, the Court of Appeal's denial of petitioner's double jeopardy motion cannot withstand scrutiny under the appropriate analysis. When the acts and omissions of the parties are carefully weighed, this case is "capable of simple resolution" on a "logical basis," *Jackson, supra*, 462 F.2d at 1049: the government is primarily responsible for the ambiguous verdict that gives rise to the Garcias' significant double jeopardy claim.

As this Court has stated:

> The right not to be placed in jeopardy more than once for the same offense is a vital safeguard in our society, one that was dearly won and one that should continue to be highly valued. If such great constitutional protections are given a narrow, grudging application they are deprived of much of their significance.

Green v. United States, 355 U.S. 184, 198 (1957).

The Court of Appeals "narrow, grudging application" of double jeopardy protections in this case requires reversal and dismissal of the indictment.

CONCLUSION

For the foregoing reasons, petitioners respectfully pray that the Court issue a writ of certiorari to review the judgments of the United States Court of Appeals for the Second Circuit.

Dated: September 26, 1991

Respectfully submitted,

BARRY A. BOHRER
Counsel of Record

JOEL M. COHEN
MORVILLO, ABRAMOWITZ,
GRAND, IASON &
SILBERBERG, P.C.
Attorneys for Petitioner
Robert Garcia
530 Fifth Avenue
New York, New York 10036
(212) 221-1414

RONALD P. FISCHETTI
FISCHETTI & RUSSO
Attorneys for Petitioner
Jane Lee Garcia
757 Third Avenue
New York, New York 10017
(212) 593-7100

APPENDIX A

Opinion of the United States Court of Appeals
for the Second Circuit
June 28, 1991
(Reported at 938 F.2d 12)

UNITED STATES OF AMERICA

Appellee,

v.

Nos. 91-1004, 91-1005

ROBERT GARCIA, JANE LEE GARCIA and RALPH VALLONE, JR.,

Defendants,

ROBERT GARCIA and JANE LEE GARCIA,

Defendant-Appellants.

Appeal from the United States District Court
for the Southern District of New York
(D.C. No. 88-CR-852)

Before: TIMBERS, MESKILL, and PRATT, Circuit Judges

GEORGE C. PRATT, Circuit Judge:

Defendants Robert and Jane Garcia appeal from an order of the United States District Court for the Southern District Court of New York, Leonard B. Sand, *Judge*, denying their motion, made on double jeopardy grounds, to bar their retrial and to dismiss the remaining counts of their indictment. For the reasons that follow, we affirm.

BACKGROUND

In November of 1988 Robert and Jane Garcia were indicted on charges of bribery, receiving illegal gratuitues, and both substantive and conspiracy counts of extortion in connection with Robert Garcia's congressional activities on behalf of the infamous Wedtech Corporation. *See United States v. Wallach*, Nos. 89-1544, 89-1563, 89-1575, slip op. 4657 (2d Cir. May 31, 1991), *United States v. Biaggi*, 909 F.2d 662 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 1102 (1991), *United States v. Stolfi*, 889 F.2d 378 (2d Cir. 1989). The alleged extortion was premised on two legal theories: (1) extortion by wrongful use of fear and (2) extortion under color of official right. At the close of the evidence at trial, the Garcias moved to dismiss the first theory for insufficient evidence. The district judge denied the motion and submitted both counts to the jury under a charge that permitted them to convict if they found either theory established by the proof.

The jury acquitted the Garcias of the bribery and gratuity charges, but convicted them of the substantive

and conspiracy charges of extortion. Although given the opportunity by the court, neither the Garcias nor the government requested that special interrogatories be given to the jury in order to learn upon which theory of extortion the jury had based its guilty verdicts. The Garcias appealed, arguing that the first theory of extortion -- extortion by wrongful use of fear -- should not have been submitted to the jury, because there was insufficient evidence to support it. We agreed, and reversed the convictions. *United States v. Garcia*, 907 F.2d 380 (2d Cir. 1990). In doing so, we explicitly pointed out that the Garcias, by making a motion under Fed. R. Crim. P. 29, had preserved their right to argue that there was insufficient evidence to support the first of the two extortion theories, and that "if there was insufficient evidence for one of the theories, then the verdict is ambiguous *and a new trial must be granted*." *Id.* at 381 (emphasis added).

We remanded to the district court "for further proceedings". *Id.* at 385. The Garcias then moved in the district court for an order barring retrial and dismissing the remaining counts of the indictment, claiming that a second trial would violate the double jeopardy protection of the fifth amendment to the constitution. The district court denied the motion, and the Garcias appeal.

DISCUSSION

The double jeopardy clause of the fifth amendment states that no person shall "be subject for the same offence to be twice put in jeopardy of life or

limb." *U.S. Const. amend. V.* Despite its sweeping language, the clause "does not preclude the Government's retrying a defendant whose conviction is set aside because of an error in the proceedings leading to conviction * * *." *United States v. Tateo*, 377 U.S. 463, 465 (1964). However, when an appellate reversal is based on insufficient evidence, a retrial is prohibited. *See Burks v. United States*, 437 U.S. 1, 18 (1978) (the double jeopardy clause "precludes a second trial once the reviewing court has found the evidence legally insufficient * * *"). The basis for this distinction is clear: "[A]n appellate reversal [based on insufficient evidence] means that the government's case was so lacking that it should not have even been *submitted* to the jury * * * [since] as a matter of law * * * the jury could not properly have returned a verdict of guilty." *Id.* at 16. To allow a second trial under such circumstances would be "to afford the government an opportunity for the proverbial 'second bite at the apple.'" *Id.* at 17.

In reversing the Garcias' convictions, we concluded that there was insufficient evidence to support a conviction of extortion based on wrongful use of fear; therefore any attempt to retry them on this theory would violate the double jeopardy clause. If the Garcias are to be subjected to a second trial, then it can only be for extortion based on the theory of color of official right.

The Garcias claim, however, that a retrial on this theory would also violate their double jeopardy protections. Because they were acquitted on the bribery and gratuity counts, the Garcias argue, it is logical to interpret the jury's silence on the theory of extortion

under color of official right as an acquittal: "[i]t is hardly speculation to conclude that it is highly probable that the jury's rejection of [the bribery and gratuity] charges, which required little proof beyond that of the Congressman's accepting the money in his official capacity, also caused it to reject the theory of extortion premised on the exact same conduct." For this reason, the Garcias conclude, a retrial on this theory would violate the double jeopardy clause.

The Garcias' argument has several defects. First, it stands in sharp contrast to the one they made at the time of their first appeal. They then asserted that their convictions should be reversed because there *was* ambiguity in determining which theory of extortion served as the basis for their convictions. In their brief at that time, they stated, "It is not possible to determine under which theory [of extortion] the jury convicted the defendants." And at oral argument, when asked about which extortion theory had been the basis of the convictions, the Garcias' lawyer stated: "We don't know what the jury did."

Now the Garcias press on us a position that is opposite to the one that they took on the first appeal. They argue that not only is it possible to determine under which theory of extortion the jury convicted them, but they confidently state that "[i]t is hardly speculation" to conclude that it is "highly probable" that the jury acquitted the Garcias of extortion under color of official right. But given their position at the first appeal, as well as our basis for reversing their convictions, their current argument borders on the frivolous. The jury's basis for

the extortion conviction cannot be "ambiguous" for the purposes of reversal, but an uncontroverted, "implicit acquittal" for double jeopardy purposes.

Second, in considering the Garcias' first appeal, we explicitly stated that if we were to decide that the evidence was sufficient for one of the two extortion theories, but insufficient for the other, "the vedict is ambiguous and a new trial must be granted." *Garcia*, 907 F.2d at 381. Concluding that the verdict was ambiguous, we reversed because there was "no way of knowing on which theory of extortion the Garcias were convicted." *Id.* at 385.

Third, in support of their position, the Garcias rely on *Green v. United States*, 355 U.S. 184 (1957), but this reliance is misplaced. In *Green*, the Supreme Court concluded that because the jury at the defendant's first trial "had refused to find him guilty on [the contested] charge", *Green*, 355 U.S. at 190, despite having been "given a full opportunity to return a verdict and no extraordinary circumstances appeared which prevented it from doing so", *id.* at 191, there had been an implicit acquittal. On this basis, the Court held that a retrial had violated the double jeopardy clause. *Id.* at 198.

But the present case differs from *Green* in a significant way. There, the jury did not render a verdict on the disputed charge, causing the Court to construe its silence as an implicit acquittal. In the present case, however, the Garcias were convicted on the contested charge, and the only unanswered question was under which of two extortion theories the jury had based its

conviction. And since the jury was never asked to state the basis for its conviction on the extortion charge, its silence on the question, unlike the silence of the jury in *Green*, signifies nothing. The conclusion that the Garcias ask us to accept regarding the extortion theory involves unacceptable speculation -- which was precisely the reason that we reversed the Garcias' convictions in the first place.

Fourth, an implicit acquittal may not be inferred, because the elements of the crime of extortion differ from those for the crimes of bribery and illegal gratuity. "At least formally, bribery contains an element that extortion does not: that money was offered with the intention of influencing the recipient." *United States v. Holzer*, 840 F.2d 1343, 1351 (7th Cir.), cert. denied, 486 U.S. 1035 (1988). The same is also true of the charge of accepting an unlawful gratuity.

Fifth, it is neither unusual nor unacceptable for a jury to render inconsistent verdicts. *See United States v. Powell*, 469 U.S. 57 (1984), *United States v. Dotterweich*, 320 U.S. 277, 279 (1943), *Dunn v. United States*, 284 U.S. 390, 393 (1932), *United States v. Chang An-Lo*, 851 F.2d 547, 559-60 (2d Cir.), *cert denied*, 488 U.S. 966 (1988). Therefore, we conclude, as we did on the Garcias' first appeal, that the verdict was ambiguous, and, in the words of the Garcias' lawyer, "there was just no way to know" what the jury was thinking when it rendered its verdict.

In rejecting the Garcias' motion, the district court applied the balancing test for implicit acquittals set out by us in *United States ex rel. Jackson v. Follette*, 462 F.2d

1041, 1049 (2d Cir.), *cert. denied*, 409 U.S. 1045 (1972). Under that test, in evaluating an implicit acquittal claim, the court "must strike a balance between fairness to society in obtaining a verdict on a proper indictment and the avoidance of undue vexation to the defendant by a retrial on both original charges * * *." *Id.* at 1049. However, even to reach "the point where we must weigh on a fine scale the competing interests of the public and [the defendant]", *id.*, we would first have to conclude that there is some basis for determining that there was an implicit acquittal, and as we have previously discussed, we find no basis for such a conclusion in this case.

Implicitly acknowledging this difficulty, the Garcias contend that in cases "where it has been impossible to determine whether the jury actually acquitted", courts have "resorted to weighing the competing interests of the parties to determine whether retrial should be barred." In arguing that the balancing test set out in *Jackson* should be extended beyond implicit acquittals to ambiguous jury decisions, the Garcias point to *United States v. Stanley*, 597 F.2d 866 (4th Cir. 1979), a case in which the fourth circuit reversed on double jeopardy grounds a conviction based on a duplicitous count. *Id.* at 871-72. It is far from certain that the fourth circuit has interpreted Stanley as broadly as the Garcias do, cf. *United States v. Head*, 697 F.2d 1200, 1206 (4th Cir. 1982), *cert. denied*, 462 U.S. 1132 (1983), and we are, of course, not bound by a holding of a sister circuit; furthermore, there was nothing duplicitous about the counts in the present case. The Garcias never claimed at trial that the counts were duplicitious, nor did they make this argument at the time of their first appeal.

They now raise this issue in a footnote, and this feeble argument does not warrant discussion. For all of these reasons, Stanley does not apply.

Even if we were to conclude that there was an implicit acquittal in this case, the double jeopardy clause would not automatically bar reprosecution. As already discussed, in an implicit acquittal case, double jeopardy concerns are only implicated where there exists both the implication of an acquittal, and a conclusion that a retrial would not serve "'the ends of public justice.'" *Jackson*, 462 F.2d at 1047 (citation omitted). In determining this latter question, one factor that should be considered is "what opportunity the defendant had to avoid the predicament by appropriate action." *Jackson*, 462 F.2d at 1049. Had the Garcias desired, they could have resolved the ambiguity involving the extortion theories. After the jury rendered its verdicts, the district court asked the defendants if they had any other questions for the jury: when none was suggested, the jury was dismissed with the Garcias' consent. Accordingly, the Garcias are incorrect in arguing that the government is to blame for the ambiguity created by the extortion theories, and there is no basis for concluding, as the Court did in *Green*, that "the jury was dismissed without returning any express verdict * * * and without [the defendant's] consent." *Green*, 355 U.S. at 191.

Thus, here, as in so many other cases, the uncertainty over theories could have been clarified through the use of special interrogatories, which would have obviated the need for a retrial. Had the jury based its verdict on the "wrongful use of fear" theory only, then

there would have been an implicit acquittal on the alternative theory and a retrial would have violated the double jeopardy clause. Had the jury clearly based its verdict on the theory of extortion under color of official right, or both theories, not only would there not have been a double jeopardy problem, but there would not even have been a reversal on the first appeal. Instead, we would have affirmed the convictions, because there was sufficient evidence to support a conviction for extortion under the official-right theory.

The Garcias correctly argue that they were under no obligation to request special interrogatories -- but neither was the government. Our holding is simply that the Garcias cannot now complain of an ambiguity that they had the opportunity to clarify. Both sides ran a risk by not requesting interrogatories and thereby leaving the verdict ambiguous. The government's risk, which matured to reality, was that if the evidence was insufficient to support both theories of extortion, the conviction would be reversed. The Garcias' risk was that if such a reversal were obtained, the result would be not dismissal but a new trial on the remaining theory.

In denying the Garcias' motion, the district court stated that "[t]he issue is not one of fault but one of opportunities missed and the consequences that flow from the omission of all parties." We agree with the district court; we note, moreover, that in addition to the possibility that this was a situation of "opportunities missed", there is the possibility that the Garcias may have had a strategic reason for leaving unresolved the ambiguity in the jury's verdict. After all, the reversal of

their convictions was based on this ambiguity. Having rejected the opportunity to clarify this ambiguity, and having secured a reversal on its strength, the Garcias cannot now disregard or deny its existence.

The order of the district court is affirmed; the mandate shall issue forthwith.

APPENDIX B
Opinion of the United States District Court
for the Southern District of New York
December 3, 1990

UNITED STATES OF AMERICA,

Plaintiff,

v.

Criminal Case
No. 88-CR-852

ROBERT GARCIA, JANE LEE GARCIA, and RALPH VALLONE, JR.,

Defendants.

OPINION

SAND, J.

Defendants Robert and Jane Garcia have moved for an order barring their retrial and dismissing the remaining counts of the indictment. Defendants claim that a retrial would be violative of the Double Jeopardy and Due Process clauses of the Fifth Amendment of the United States Constitution. According to the defendants "a jury verdict stemming from the government's erroneous insistence that the case be submitted to the jury upon multiple legal theories when there was no

evidence to support one of the two theories bars retrial." Defendants argue that the bar follows since it is now impossible to determine whether "the jury acquitted on the theory upon which the government seeks a retrial." Memorandum of Law in Support of Robert and Jane Lee Garcia's Motion to Bar Retrial pp. 1-2 (hereafter "Defendants' Memorandum). For the reasons set forth below, the defendants' motion is denied.

I. Background

Robert and Jane Lee Garcia were indicted on charges of conspiracy, extortion, bribery and receiving gratuities in connection with Robert Garcia's congressional activities and actions taken with respect to the Wedtech Corporation. The charges of extortion and conspiracy were premised on two theories: (1) extortion by wrongful use of fear and (2) extortion under color of official right. After trial both Robert and Jane Garcia were convicted of extortion and conspiracy. The defendants were both acquitted on the bribery and gratuities counts.

Prior to submitting the case to the jury, at the charging conference, defendants questioned the sufficiency of the evidence in support of the "fear of economic loss" theory, raising no question as to the sufficiency of the evidence relating to the "under color of official right" theory of extortion. This Court, after reviewing the relevant testimony of the government's key witness, Mario Moreno, concluded that there was sufficient evidence to submit the case to the jury on both

theories, cautioning the jurors that they must be unanimous on the theory they adopt. (Tr. 2681). After announcement of the verdict but prior to discharge of the jury, this Court inquired of counsel whether there were any other matters to take up with the jury. No request was made by any party for special interrogatories of the jury.

Thereafter, in a timely manner, defendants moved under Federal Rules of Criminal Procedure ("F. R. Crim. P.") 33 for a new trial based on insufficiency of proof on the "fear of economic loss" theory. No motion was made pursuant to F. R. Crim. P. 29(c) for a judgment of acquittal arguing that the only proper relief for their insufficiency claim was a dismissal of the charges by reason of the Double Jeopardy and Due Process clauses of the Fifth Amendment. Likewise, although it is not dispositive of this motion, *See Burks v. United States*, 437 U.S. 1, 3 (1978), upon appeal no relief was sought by defendants other than the granting of a retrial. The F. R. Crim. P. 33 motion was denied.

On appeal, the Court of Appeals concluded that the Moreno testimony was insufficient to support an extortion conviction based on a fear of economic loss. In reversing the conviction, the Court wrote:

> Since the jury was not given special interrogatories, we cannot determine on this record the precise basis for the guilty verdicts. Therefore, for our purposes, we must assume the jury could have found the Garcias guilty of extortion under either theory presented by the

> government. Consequently, if there was insufficient evidence for one of the theories, then the verdict is ambiguous and *a new trial must be granted*. *United States v. Natelli*, 527 F.2d 311, 325 (2d Cir. 1975), *cert. denied*, 425 U.S. 934 (1976); *see also United States v. Ruggiero*, 726 F.2d 913, 921 (2d Cir.), *cert. denied*, 469 U.S. 831 (1984).

United States v. Garcia, 907 F.2d 380, 381 (2d Cir. 1990) (emphasis added). As the Court held, the new trial would be "on the remaining theory -- extortion under color of official right." *Id.* at 381. In conclusion the Court wrote "Accordingly, we must reverse the judgments of conviction and remand to the district court for further proceedings." *Id.* at 385.

II. Discussion

In support of their motion to this Court that the Double Jeopardy Clause and the Fifth Amendment bar a new trial on the "color of official right" theory of extortion, defendants advance four arguments: (1) analogous case law applying the Double Jeopardy Clause under similar circumstances bars retrial, (2) the problem presented is purely of the government's making, (3) the defense did everything it was legally obligated to do, and (4) the rule of lenity. Defendants' Memorandum P.2. We consider these contentions seriatim.

A. Analogous Case Law Applying the Double Jeopardy Clause

The Fifth Amendment of the United States Constitution provides, in part, that no person shall be "subject for the same offense to be twice put in jeopardy of life or limb." Underlying the Double Jeopardy Clause is the prohibition against reprosecution of a defendant on the same facts, for the same offense where a trial ends in a judgment of conviction or acquittal. *See Green v. United States*, 355 U.S. 184, 200-05 (1957) (retrial on the greater offense is barred when a conviction on the lesser included offense is reversed). In contrast, there is generally no bar to the retrial of a defendant who obtains a reversal of a conviction on appeal. *United States v. Tateo*, 377 U.S. 463, 466 (1964); *United States v. Ball*, 163 U.S. 662 (1896). The only exception to this rule is where the reversal constitutes the equivalent of a judgment of acquittal. *Burks v. United States*, 437 U.S. 1, 16 (1978).[1]

The leading Second Circuit case applying the *Burks* implied acquittal holding for Fifth Amendment Double Jeopardy Clause purposes is *United States Ex Rel. Jackson v. Follette*, 462 F.2d 1041, 1050 (2d Cir.) *cert. denied*, 409 U.S. 1045 (1972). In *Jackson*, the Court established a balancing test to determine whether a

[1]In *Burks*, the Supreme Court held that where reversal is based solely on evidentiary insufficiency and the entire case should not have been submitted to the jury a reversal enjoys absolute finality. 437 U.S. at 16.

reversal rises to the level of an acquittal for Fifth Amendment purposes when a jury verdict is ambiguous. The balancing included consideration of undue vexation to the defendant by a retrial and opportunities he had to avoid the predicament by appropriate action. On the other side, the Court considered the government's contribution to the situation and fairness to society in obtaining a verdict on a proper indictment. *Id.* at 1049.

In *Jackson* the defendant was charged with one count of murder under the theories of premeditated murder and felony murder. The jury convicted defendant of premeditated murder but returned no verdict on the felony murder theory. On appeal, the Supreme Court granted defendant's request for a new trial based on the erroneous admission of evidence. *Id.* at 1043. Over his Double Jeopardy objection, Jackson was retried on both the felony murder theory and the premeditated murder theory. At the second trial Jackson was convicted on the felony murder theory but the jury returned no verdict on the premeditated murder theory. Jackson's conviction was affirmed and he filed a habeas petition in federal district court. *Id.* at 1044.

In balancing the competing interests, the Second Circuit concluded that Jackson's retrial was proper for a number of reasons. Two of the reasons are relevant for determining whether a retrial of the Garcias is constitutionally permissible. First, in *Jackson*, as in this case,

there was no acquittal on the charge at issue.[2] Second, the *Jackson* Court held that special verdicts and special interrogatories could have been requested to resolve any ambiguity in the verdict. As the Court concluded, the defense attorney in *Jackson* was content not to have a special verdict rendered for strategic reasons that were favorable to the defendant. *Id.* at 1052.

In this instance, though certainly the defense was under no legal obligation to request a special verdict or special interrogatory, that possibility was available. The defendants as well as the government failed to ask more of the jury after the general verdict was rendered. The fact that the defense objected to one theory going to the jury is not dispositive on the question of whether the jury acquitted the defendants on the "color of official right" theory. A definitive answer would have been rendered if special interrogatories had been taken. The issue is not one of fault but one of opportunity missed and the consequences that flow from the omission of all parties.

The other cases cited by defendants are entirely distinguishable. Defendants principally rely on cases such as *United States v. Stanley*, 597 F.2d 866, 872 (4th Cir. 1979) where a conviction on a duplicitous count was

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[2] Other circuits and courts have also been unwilling to apply the Double Jeopardy bar where retrial is sought on a theory as to which the jury's verdict at the first trial is not known. *See United States v. Fitapelli*, 786 F.2d 1461, 1465, (11th Cir. 1986); *Commonwealth v. Fickett*, 403 Mass. 194, LEXIS copy at 5, n.4. (1988).

reversed. But it is clear, even in the Fourth Circuit, that Double Jeopardy does not preclude a retrial where the count is not duplicitous although some of the grounds urged in support of the count are invalid, such as a bar by the statute of limitations. *United States v. Head*, 697 F.2d 1200, 1206 (4th Cir. 1982). No claim of duplicity is properly raised here. Defendants' suggestion that the indictment was defective (Defendants' Reply Brief, pp. 3-4), as distinguished from the proof of one of multiple theories being inadequately proven, is totally unfounded.

B. Claim that the problem was purely of the government's making and that the defense did all it was legally obligated to do.

Defendants urge that it is fair to characterize the "problem presented by the instant fact situation" as one "purely of the government's making" because it was the government which drafted and obtained the indictment, insisted there was adequate evidence of fear of economic loss and failed to request a "special verdict".[3] Defendants' Memorandum, p.2; Defendants' Reply Memorandum, p.4.

The contention that the problem is solely attributable to the government because it proceeded on

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[3] The Court of Appeals spoke of "special interrogatories", *Garcia*, 907 F.2d at 385, not "special verdicts". Special verdicts are generally disfavored in criminal cases. *See United States v. Spock*, 416 F.2d 165, 180-83 (1st Cir. 1969); *United States v. Gallishaw*, 428 F.2d 760, 765 (2d Cir. 1970).

multiple theories of extortion, only one of which was adequately proven, is merely a recasting of the defendants' basic claim that the consequence of a reversal under such circumstances is to bar a retrial on the viable theory. Defendants' effort to equate this case with those where affirmative government misconduct precludes a retrial is unpersuasive.

The question whether Moreno's testimony satisfied the requirements of *United States v. Capo*, 817 F.2d 947, 951 (2d Cir. 1987), was twice presented to this Court, first at the charging conference and later in defendants' post trial motion. Although the Court of Appeals disagreed with this Court's affirmative response to this question, there is no basis for any suggestion that the government's theory was so unfounded or unjustified as to constitute deliberate governmental wrongdoing or any lack of good faith in the government's belief that the Moreno testimony satisfied the requirements of *Capo*.

Nor can it be said that the government's failure to seek a special interrogatory constitutes a dereliction on the government's part which warrants barring a retrial on this ground. The use of special interrogatories in criminal cases is relatively rare although becoming more common under special circumstances such as ascertaining quantities of narcotics relevant for sentencing purposes. The government often proceeds on multiple theories in indictments such as those which charge that a defendant distributed or possessed with intent to distribute narcotics. Special interrogatories are nevertheless generally not utilized. Moreover, as noted above, neither party requested a special interrogatory. After the jury's

verdict heightened the significance of the issue because of its acquittal on the bribery and gratuity counts, neither party responded affirmatively to the Court's specific inquiry whether anything further was required of the jury.

The preferred practice when special interrogatories are utilized is to submit them to the jury only after a general verdict is returned, thereby minimizing the danger of jury coercion or intrusion into the jury's prerogatives thought by some courts to result from use of special verdicts in criminal cases, *see United States v. Spock*, 416 F.2d 165, 180-83 (1st Cir. 1969) (citing authorities); *see also United States v. Gallishaw*, 428 F.2d 760, 765 (2d Cir. 1970). It follows therefore that the defendants had an opportunity to request that a special interrogatory be submitted to the jury after it had returned its general verdict. Counsel failed to respond affirmatively to the Court's inquiry whether anything further should be asked of the jury.

Clearly the defense did all that was legally required to preserve the right to question the sufficiency of the evidence as to fear of economic loss and the Court of Appeals has so held. But, this is not a case of the government resisting any defense proposal other than abandonment of the theory in its entirety. This Court is in no way critical of the actions and omission of the able and experienced defense counsel. The point is simply that this case is not one in which government action is the sole cause of the present posture of this case.

C. Application of the Rule of Lenity.

The rule of lenity gives the defendant the benefit of any ambiguity in a penal statute on the grounds that persons are entitled to know with specificity what conduct it outlawed. We do not see its relevance to the Double Jeopardy and Due Process claims raised here. Defendants can hardly claim that they were misled into believing their conduct was lawful when Robert Garcia made his "disgraceful request for money." *Garcia*, 907 F.2d at 383. Claims that the rule of lenity applies because of the government's "erroneous treatment of the facts" is again a repetition of defendants' claim that retrial is precluded per se whenever there is a finding that evidence of one prong of a claim based on multiple theories is insufficiently proven.

III. Conclusion

We note and are not unsympathetic to the urging of defense counsel that a retrial will subject defendants to additional expense and prolonged anxiety. But these consequences follow whenever a conviction is reversed and the case is remanded for retrial. One might argue that a defendant should be required to run the guantlet of the criminal process only once and that if a conviction fails for any reason to pass appellate muster, the defendant must go free. But the Supreme Court of the United States has clearly established that for sound policy reasons, for the benefit not only of society as a whole but defendants in particular, the law is otherwise. As Justice Harlan wrote "it is at least doubtful that appellate courts would be as zealous as they now are in

protecting against the effects of improprieties at the trial ... if they knew that reversal of a conviction would put the accused irrevocably beyond the reach of further prosecution." *Tateo*, 377 U.S. at 466.

The motion is denied.
SO ORDERED.

Dated: December 3, 1990
New York, New York

Leonard B. Sand, Judge
United States District Court

APPENDIX C
Opinion of the United States Court of Appeals
for the Second Circuit
June 29, 1990
(Reported at 907 F.2d 380)

UNITED STATES OF AMERICA,
Appellee,

Nos. 90-1088
90-1089

v.

ROBERT GARCIA and
JANE LEE GARCIA,

Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of New York
(D.C. No. 88-CR-852)

Before: MESKILL, PIERCE and PRATT, Circuit Judges.

GEORGE C. PRATT, Circuit Judge:

Defendants Robert and Jane Garcia appeal from judgments of conviction on two counts of extortion (18

U.S.C. § 1951) and one count of conspiracy to commit extortion (18 U.S.C. § 371) entered against them in the United States District Court for the Southern District of New York, Leonard B. Sand, Judge. For the reasons that follow, we reverse the Garcias' convictions and remand to the district court for further proceedings.

BACKGROUND

Robert and Jane Garcia were charged with conspiracy, extortion, bribery, and receiving gratuities in connection with Robert Garcia's congressional activities on behalf of the now infamous Wedtech Corporation. The extortion and conspiracy charges were premised on two theories: (1) extortion by wrongful use of fear and (2) extortion under color of official right. At the close of the government's case, the Garcias moved for dismissal of the first theory. The district judge denied this request, concluding -- erroneously, as we establish below -- that the government had adequately demonstrated that the Garcias intended to exploit Wedtech's fear of economic loss.

The Garcias were acquitted by the jury of the bribery and gratuity charges, but were convicted of the substantive and conspiracy charges of extortion. Following the jury's verdicts, the Garcias moved for a new trial, claiming that the jury's acquittal of them on the bribery and gratuity counts suggested that the guilty verdicts on the extortion counts were based not on the second theory -- under color of official right -- but instead on the first theory of extortion -- wrongful use of fear -- and that the evidence could not support that

conclusion. Neither the government nor the Garcias had requested that special interrogatories by given to the jury in order to learn the actual basis for their decision. The district judge denied the new trial motion, and the Garcias appeal their convictions.

Since the jury was not given special interrogatories we cannot determine on this record the precise basis for the guilty verdicts. Therefore, for our purposes, we must assume the jury could have found the Garcias guilty of extortion under either theory presented by the government. Consequently, if there was insufficient evidence for one of the theories, then the verdict is ambiguous and a new trial must be granted. *United States v. Natelli*, 527 F.2d 311, 325 (2d Cir. 1975), *cert. denied*, 425 U.S. 934, 96 S. Ct. 1663, 48 L.Ed.2d 175 (1976); *see also United States v. Ruggiero*, 726 F.2d 913, 921 (2d Cir.), *cert. denied*, 469 U.S. 831, 105 S. Ct. 118, 83 L.Ed.2d 60 (1984). By their Rule 29 motion to withhold from the jury the theory of extortion by fear of economic loss, the Garcias preserved their right to argue here that if the evidence was insufficient to support their extortion convictions on that theory, we should reverse and order a new trial on the remaining theory -- extortion under color of official right. We turn, then, to the sufficiency of the evidence to prove extortion by fear of economic loss.

Extortion is defined in the Hobbs Act as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." 18 U.S.C. § 1951(b)(2). Over the years, our cases have

concluded that the fear required in extortion cases "can be satisfied by putting the victim in fear of economic loss." *United States v. Brecht*, 540, F.2d 45, 52 (2d Cir. 1976) (citations omitted), *cert. denied*, 429 U.S. 1123, 97 S. Ct. 1160, 51 L.Ed.2d 573 (1977); *United States v. Margiotta*, 688 F.2d 108, 134 (2d Cir. 1982) (citations omitted) ("[P]utting the victim in fear of economic loss can satisfy the element of fear required by the Hobbs Act."), *cert. denied*, 461 U.S. 913, 103 S. Ct. 1891, 77 L.Ed.2d 282 (1983).

In *United States v. Capo*, 817 F.2d 947 (2d Cir. 1987), our court, sitting in banc, focused specifically on what factors are necessary to establish fear of economic loss. The present appeal requires us to apply the standards that we developed in *Capo* to a factual setting involving an elected official who sold his influence and power. *Capo* involved a job-selling scheme that took place at a plant of the Eastman Kodak Company. In 1982 Kodak announced that production of its new "disc camera" created the need for approximately 2,300 new employees. In the rush to fill these jobs, standard hiring procedures were ignored. Exploiting this situation, the defendants used their influence with an employment counselor at Kodak to see that individuals who paid them were hired as Kodak employees. This job-selling network formed the basis of an indictment for extortion based on the fear of economic loss, and the jury convicted.

On appeal, a panel of this court affirmed, *see United States v. Capo*, 791 F.2d 1054 (2d Cir. 1986), but after an in banc rehearing we reversed, holding that a

fear of economic loss must be viewed from the victim's perspective and that the victim must have reasonably believed "first, that the defendant had the power to harm the victim, and second, that the defendant would exploit that power to the victim's detriment." *Capo*, 817 F.2d at 951. Concluding that the Kodak job-selling scheme was not extortion, we emphasized that the "victims" had paid the defendants in an attempt to obtain influence. *Id.*, at 954. The "victims" in *Capo* thus did not act out of fear of the defendants or of what the defendants might do to them; rather, they were willing participants who were seeking to secure the defendants' assistance in order to improve their chances of obtaining a job. *Id.*, at 952.

The Garcias claim that their situation is similar to the one in *Capo*. They argue, in effect, that the payments that they received, like the payments in *Capo*, were not made out of fear but as a way of obtaining influence. For this reason, they claim, there was insufficient evidence to convict them of extortion based on a fear of economic loss. While a defendant challenging the sufficiency of the evidence "bears a 'very heavy burden'", *United States v. Chang An-Lo*, 851 F.2d 547, 553 (2d Cir.), *cert. denied*, 488 U.S. 966, 109 S. Ct. 493, 102 L.Ed.2d 530 (1988) (citations omitted), we nevertheless agree with the Garcias and conclude that the evidence in this case was insufficient to support an extortion conviction based on a fear of economic loss.

DISCUSSION

At trial the government relied on two claimed extortionate events: (1) a dinner meeting at a Manhattan restaurant and (2) a $20,000 loan by Wedtech to the Garcias.

A. The Alleged Dinner Extortion.

In 1978 Robert Garcia was elected to the United States Congress as a representative of the South Bronx, where the Wedtech Corporation was located. During his first years in office, Garcia extended normal congressional assistance to Wedtech in connection with a $550,000 loan from the Small Business Administration, $4 million in loans from the Economic Development Administration, and a bid for an army contract.

In April of 1984, Wedtech received a $24 million dollar contract to build pontoons for the navy. A few weeks after Garcia, along with other congressional figures, had attended a press conference announcing the award of this contract, Garcia called Mario Moreno, a Wedtech officer, and told him that it was important that the two of them meet. They agreed to have dinner the next evening at a midtown Manhattan restaurant.

Garcia and his wife, Jane, met Moreno. The congressman complained that Moreno had not kept him properly informed about Wedtech's activities. Moreno first described Wedtech's success and rapid growth in recent months. Then, when Moreno told the Garcias that Wedtech was having difficulties with the navy

pontoon contract, Jane Garcia interjected that she and her husband were friendly with a classmate of then Secretary of the Navy John Lehman and that they could arrange a meeting with Lehman to resolve some of the problems with the contract. Robert Garcia boasted of his increasing influence in congress, and then proposed that Wedtech hire Jane Garcia as a public relations consultant.

Moreno told the Garcias that Wedtech which was dealing primarily with government contracts, had no need for a public relations consultant and even if it did, it would be "crazy" to hire the wife of a congressman for the position. Garcia persisted, commenting that perhaps the payments to his wife could be made in another way. Jane Garcia then suggested that she be paid through an intermediary, Ralph Vallone, Jr., a lawyer in Puerto Rico who was a good friend of the Garcias.

As the dinner came to an end, the Garcias emphasized their influence with top officials at the navy and at the United States Postal Service. They did this knowing that Wedtech was attempting not only to resolve its problems with the navy pontoon contract, but also that the company was attempting to obtain postal contracts. At this point, Moreno told the Garcias that he personally supported their proposal and would seek approval for it from other Wedtech officials.

Fearing that a denial of payments to Jane Garcia would induce Garcia to withhold his support for the postal contracts Wedtech sought, the Wedtech officers approved the payments.

Wedtech began to send monthly checks to Vallone, who then deposited them and sent Jane Garcias's consulting company, Leesonia Enterprises, checks of comparable amounts. During the period that these payments were made, Jane Garcia received $76,000.

In support of its claim that Wedtech made these payments out of economic fear, the government points primarily to Robert Garcia's statement at the beginning of the dinner conversation. Moreno testified that Garcia had said:

> We have been apart for a long period of time. We don't communicate as much as we used to before, several years before, two or three years before. We had to find out from somebody else that the company had gone public, and that other people had benefited from the company * * *. Can you explain to me what has happened there at the company in reality in the last year or so?

The government claims that Garcia made this statement knowing that Wedtech's economic life depended on continued political influence. This statement, it argues, was therefore an implicit threat: Garcia was warning Wedtech that unless he and his wife were paid, the company could no longer count on Garcia as a congressional advocate. This could in turn lead to a failure to obtain any more government contracts. But did Moreno perceive this statement as such a threat? There is no

evidence that he did; on the contrary, the evidence shows that he did not.

During the dinner, the Garcias mentioned their contacts in the Postal Service, from which Wedtech was attempting to obtain a contract. Moreno stated that during the dinner he was thinking "that the Congressman [Garcia] could be a tremendous ally in * * * trying to get [the] contracts from the Postal Service."

When asked at trial why he approved the payment of money to Jane Garcia, Moreno answered:

> Because I felt that if we were not going to make those payments, the Congressman was not going to do the kind of activity that we would need to have done to convince Postmaster General Bolger to set aside those contracts for Wedtech.

Later, Moreno testified: "I felt that if we were not to satisfy those payments, we were not going to receive any activity beneficial to us regarding those postal contracts."

This is not the mindset of a victim of economic extortion; rather, it is the thinking of a shrewd, unethical businessman who senses and seeks to capitalize on a money-making opportunity.

The central fact is clear: even in the face of Garcia's disgraceful request for money, Wedtech was not risking the loss of anything to which it was legally entitled. Wedtech would still be permitted to bid on

government contracts. But without Garcia's favorable attitude, the company might not be able to count on continued preferential treatment, nor could it secure Garcia's favorable intervention in the future. Garcia, in turn, was in effect offering to sell his congressional power, but he was not using that power as a way to intimidate Wedtech. By paying the Garcias, Wedtech was purchasing an advocate, not buying off a thug.

On redirect examination of Moreno, the prosecutor crystallized the motivating reason behind Moreno's decision to make the payments:

> Q. Now, sir, you were asked questions about -- by both lawyers about the meeting at Lelo's [the Manhattan restaurant]. Did you consider it legal or illegal to agree to Congressman Garcia's request that you pay his wife through Vallone?
>
> A. Illegal.
>
> Q. Why did you consider it illegal?
>
> A. Because we were constituents in Congressman Garcia's district. And to my knowledge, he is not supposed to be receiving any payments for any services he may perform for the company with the government. And I always viewed him and his wife as one unit.

> Q. When you made that agreement in Lelo's in May of 1984, did you agree to pay the money for services from Jane Garcia or Congressman Robert Garcia?
>
> A. For Congressman Garcia's services.

In short, the dinner meeting did not generate in Moreno or Wedtech any fear of economic loss within the meaning of the federal extortion statute as we have interpreted it in *Capo*.

B. The Alleged $20,000 Loan Extortion.

The Garcias were also convicted of extorting a $20,000 loan from Wedtech. On August 2, 1985, Robert Garcia told Moreno it was urgent that they meet and discuss a matter that was too sensitive to discuss over the phone. Moreno agreed and met Garcia at his Bronx congressional office. When Moreno arrived, Garcia asked to borrow $20,000 immediately, since he was leaving shortly for the Middle East. Moreno, who was $12,000 overdrawn at the bank himself, told Garcia that this loan could probably be arranged, but that he would have to check with other Wedtech officials. After getting the necessary funds from Wedtech's "slush fund", Moreno returned the same day to Garcia's office where Garcia suggested that the check be made payable to his sister, the Reverend Aimee Cortese, who would in turn forward the money to the Garcias. Garcia then directed a congressional aide to prepare documentation showing a loan between Moreno and Cortese. In Garcia's office, Moreno gave a check for $20,000 to Cortese, who

deposited it and wrote another check to Jane Garcia for the same amount. Moreno testified that he believed that if he did not lend Garcia the money, Garcia would no longer help Wedtech.

Although the loan was supposed to be repaid in October of 1985, the Garcias did not repay it until March of 1986. Before finally repaying the loan, Robert Garcia asked Moreno to donate the $20,000 to the Reverend Cortese's church. Moreno declined, telling Garcia that he needed the money himself but that perhaps he would make a donation to the church in the future.

Recognizing that it has presented no evidence to demonstrate that even an implicit threat accompanied Robert Garcia's request that Wedtech lend him $20,000, the government argues that the Garcias' original "threat" created a "climate of fear" that colored all their future dealings with the company. While Moreno testified that he had agreed to the loan because without it Garcia "would not continue to do things in the same way that [Moreno] felt he could do", this does not demonstrate the kind of fear that is required by our decision in *Capo*. Had Garcia actually established a climate of fear, as the government contends, Wedtech would not have refused Robert Garcia's request that Wedtech convert its loan into a "donation" to his sister's church. But this is precisely what Wedtech did, and its refusal powerfully illustrates Wedtech's lack of fear.

The government does not have to prove that a climate of fear was created by a direct threat;

nevertheless, the government must at least prove the existence of the victim's belief that the defendant had the power to harm it and the victim's fear that the defendant would exploit that power. *See Capo*, 817 F.2d at 951. However, there was no evidence that in making these payments Wedtech acted out of fear. At the time the alleged initial "threat" was made, Moreno viewed Garcia as an "ally." Moreover, the Garcias did not threaten Wedtech with harm, but instead underscored the mutual benefits that would flow from Wedtech's payments: the Garcias would obtain badly needed cash, and Wedtech would receive more government contracts than was likely without Garcia's help.

While the evidence readily proved that Wedtech paid the Garcias in the hope of receiving future favors, it did not establish that the company acted out of fear that without these payments it would lose existing contracts or even opportunities to which it was legally entitled. As in *Capo*, there was an "absence of any evidence of detrimental action for nonpayment * * *." *Capo*, 817 F.2d at 953. Garcia never even hinted that he was prepared to use his power to harm Wedtech.

Without expressing -- however implicitly -- such a threat, the Garcias did not create in Moreno or Wedtech any feeling of fear; there is no evidence of any other cause of fear; and without the victim feeling some fear, extortion through fear of economic loss cannot exist. Wedtech paid the Garcias to ensure that it would receive special, preferential treatment; in making the payments, the company was motivated by desire, not fear; by opportunity, not by concern with retribution. As

we sought to make clear in *Capo*, that is not the stuff of which extortion is made.

SUMMARY AND CONCLUSION

Because there were no special jury interrogatories, we have no way of knowing on which theory of extortion the Garcias were convicted. The district court, over objection, permitted the jury to consider the theory of economic loss, but we have concluded that the evidence presented was insufficient to support that conviction. Accordingly, we must reverse the judgments of conviction and remand to the district court for further proceedings.

We do not reach the alternative, evidentiary issue raised by the Garcias.

The mandate shall issue forthwith.

Reversed and remanded.